IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 708 of 1989

AND

SPECIAL CIVIL APPLICATION NO.5315 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JASHVANTKUMAR J DESAI

Versus

SABARKANTHA DISTRICT PANCHAYAT

Appearance:

1. S.C.A. NO. 708 OF 1989 ::

MR DEVANG D. TRIVEDI for MR JAYANT P BHATT for Petitioner
MS MK VAKHARIA for Respondent No. 1
NOTICE SERVED for Respondent No. 2, 3

2. S.C.A. NO. 5315 OF 1992 ::

MR R.K.MISHRA for petitioner
MR PREMAL JOSHI, AGP, for the State
MR KH BAXI - Absent for respondent No.2

CORAM : MR.JUSTICE R.K.ABICHANDANI

Date of decision: 10/11/2000

ORAL COMMON JUDGEMENT

1. These two matters have been heard together because the points involved are similar.

2. In Special Civil Application No.708/89, the petitioner, who was working as a work-charge clerk from time to time on periodic appointments in the office of the respondent No.2 - Executive Engineer, District Panchayat, Sabarkantha, seeks a direction on the respondents to absorb him in service with full backwages by treating him in continuous service from the date of his initial appointment i.e. from 4/6/1984. According to him, between June 1984 to November 1985, under the periodic orders of appointment for 29 days, he had completed service of more than 19 months. Thereafter, by an order dated 7/10/1985, his services were put at the disposal of the Deputy Executive Engineer, Roads & Building Sub Division, Idar for appointment on 29 days basis. He was relieved from duty from the scarcity works as per the order dated 30th July 1988, and was not allowed to resume his duty as work-charge clerk thereafter. According to the petitioner, the order of termination of his service was arbitrary, and that he was entitled to be continued in service as a regular employee.

2.1 The respondents - authorities, in their affidavit in-reply, have pointed out that there were 31 posts on the temporary establishment of the Panchayat Divisions and the projects were undertaken at the instance of the Government on work-charge basis. The expenditure incurred by the Panchayat beyond 2% of the estimated costs of the work was to be met from the local funds of the Panchayat. The petitioner was appointed as a work-charge clerk at a time when the District Panchayat had sufficient work for the maintenance of the roads and buildings. However, as per the order dated 4/10/1988 of the State Government, the roads admeasuring 501.03 KMs were transferred to the State Government and the work of Division No. I of Sabarkantha District Panchayat had been substantially reduced, as a result of which, about 20 regular work-charge clerks became surplus, and were to be transferred to some other Roads & Building Division of the State Government. It is stated that the petitioner had been relieved as per the terms and conditions of his appointment, because when he was appointed on scarcity works, his appointment was made subject to the condition that it was liable to be terminated at the end of the

scarcity works. It is stated that as and when new projects come up, work would be offered to such persons according to their seniority. It is contended that the petitioner was the junior most workcharge clerk employee, and that he could not have any grievance against the termination of his service, which was as per the terms and conditions of his appointment. It is stated that the termination of the petitioner's service was as per the circular and the resolutions issued from time to time and because he was only a workcharge employee appointed for a temporary period.

3. In Special Civil Application No. 5315/1992, the petitioner, who was engaged as a daily wager driver and thereafter as a daily wager peon, challenges the order of termination of his services made on 4/8/1992 by the respondent No.2. According to him, he was being appointed on periodic basis as a daily wager right from 9/3/1990, and in all 26 such periodic orders were made upto 19/6/1992, as per Annexure `B' collectively to the petition. Though the petitioner was assigned the work of a peon from 1/6/1992 under order dated 19/6/1992 at Annexure `C' to the petition, he was still performing the duties of a driver. According to him, his services could not have been brought to an end on the basis of the artificial breaks, and he ought to have been treated as if in regular service. A direction is therefore sought to reinstate him with all consequential benefits of seniority and continuity in service as well as the emoluments.

3.1 The respondents, in their affidavit in-reply, have stated that the Gujarat Backward Class Development Corporation was under an obligation to make appointments to such posts through Employment Exchange under the provisions of the Employment Exchange [Compulsory Notification of Vacancies] Act, 1959, and the post of driver falls within the category in respect of which appointments are to be made as per the said Act. The Government, by its resolution dated 2nd July 1988, had created one post of driver, which brought the total number of posts to three. As per the roster, one of these three posts was to be filled in from amongst the members of Schedule Tribes. At the time of creation of the third post, two posts were already filled in, and none of the incumbents working in those posts was of Schedule Tribes. Therefore, as per the rules, the said post was required to be filled in from Schedule Tribes. In the selection process, a member of Schedule Tribes was selected and appointed as a driver, but he did not accept the appointment. In the meantime, the petitioner was

appointed as a daily wager to work as a driver. Later on, when instead of three vehicles, the Corporation was left only with one vehicle in a working condition and two permanent drivers in service, the question of filling in the third post did not survive. The petitioner was thereafter given employment as a daily wager peon from 1/6/1992. However, on that post also, a member of Schedule Tribes was to be recruited as per the roster and the post was required to be filled in through the Employment Exchange. Therefore, the petitioner was informed by the impugned order dated 4/8/1992 that his services were no more required after 4/8/1992.

4. The learned counsel appearing in these two petitions have contended that the services of the petitioners have been terminated without giving any notice, as was required to be done under the provisions of Rule 33[1][b] of the Bombay Civil Service Rules, which required that the services of a temporary government servant who has put in service for one year or more was liable to be terminated at any time by notice in writing given to him by the appointing authority of one month, and in case of an employee who had put in service for less than one year, such notice of one week. It was argued that no notice was given to these petitioners, and therefore, the termination of their services was violative of the provisions of Rule 33 of the B.C.S.R. It was also argued that these petitioners should be treated as regular employees because they had worked under the periodic orders for a long time.

4.1 In support of their contentions, the learned counsel for the petitioners relied upon the following decisions :-

[a] The decision of the learned Single Judge in Special Civil Application No. 8619/94 rendered on January 23, 1996 was relied upon in order to point out that where an order of termination was made without following the provisions of Rule 33[1][a] and [b] of the said Rules, it was set aside and the authority was directed to reinstate the employees in the same posts in which they were working on the date of the impugned termination, with full backwages.

[b] Sub-Divisional Soil Conservation Officer, Idar v/s M.M.Saiyed reported in 31[1] GLR 495 was cited with a view to point out that a Division Bench of this Court, in context of the provisions of Rule 33[1][b] of the said Rules, held that the

services of a temporary government servant can be terminated after giving a due notice or by paying salary for the notice period. In that case, the Division Bench noted that the services of the respondents were terminated not by efflux of time under the last appointment order of 29 days, but prior thereto by way of intimation terminating his services after office hours on 19/10/1985, when one month's notice was required by Rule 33[1][b] for such termination.

[c] Taufikhhussein G. Sindhi v/s Deputy Industries Commissioner reported in 1992[1] GLH [UJ] 15, at page 27, was referred to for its proposition that failure to comply with Rule 33[1][b] invalidated the order of termination.

A decision of the Division Bench in Arunkumar M. Mehta v/s State of Gujarat reported in 1991[2] GLH [UJ] 1 was also relied upon for the same proposition.

[d] Reliance was placed on a decision of the Supreme Court in Karnataka State Private College Stop-Gap Lecturers Association v/s State of Karnataka and others reported in AIR 1992 SC 677 to point out that the Supreme Court in a case where teachers who were appointed temporarily by privately managed degree colleges receiving cent per cent grants-in-aid, controlled administratively and financially by the Education Department of the State of Karnataka, sought regularisation of their services by invoking principle of equitable estoppel arising from implied assurance due to their continuance, as such, for years with a break of a day or two every three months, the Supreme Court had directed to treat such breaks as ultra vires and for taking steps to fill up permanent vacancies in accordance with rules, and further directed that the services of such temporary teachers who had worked for three years including the break shall not be terminated. It will be noted that the Supreme Court in para 5 of the judgement held that, "A temporary or ad hoc employee may not have a claim to become permanent without facing selection or being absorbed in accordance with rules but no discrimination can be made for same job on basis of method of recruitment."

5. The learned counsel for the respondents, in

support of their contentions, placed reliance on the following decisions :-

[a] State of Gujarat & ors. v/s P.J.Kampavat & ors. reported in 34[1] GLR 848 a decision of the Supreme Court was cited to point out that, in context of Rule 33[1][b] of the said Rules was not applicable in such cases in view of the opening words of Rule 2 of the said Rules, which contained the non obstante clause ("except where it is otherwise expressed or implied"), and because the order appointing the respondents expressly states not only that their services shall be terminated at any time without giving any notice and without assigning any reasons, but also that their appointment is for a limited period conterminous with the concerned minister's tenure. It was held that the terms of their appointment and undertaking executed in those terms were clearly inconsistent with Rule 33[1][b] of the said Rules. The Supreme Court held that the appointment of these respondents was a pure and simple contractual appointment and that such appointment did not attract and was outside the purview of Bombay Civil Service Rules, 1959, and no order of termination as such was necessary for putting an end to their services, much less a prior notice.

[b] The decision of this Court in Savitaben M. Patel & ors. v/s State of Gujarat & ors. reported in 38 [2] GLR 1567 was cited to pointed out that appointment of those petitioners for 29 days was held to be a fixed term appointment and it was held that as per the terms and conditions of appointment, their services were liable to be terminated without any notice and Rule 33[1][b] of the said Rules was not attracted.

[c] The decision of this Curt in Nilesh Bhatt & ors. v/s Administrative Officer, Nagar Pradhamik Shikshan Samiti & ors. reported in 1996[1] GLH 108 was cited for the proposition that when the appointment was itself adhoc, temporary and for a fixed term and subject to further stipulation that it was liable to be brought to an end earlier without notice, the principles of natural justice need not be followed while terminating the services of such employees. It was held that a person who was appointed on temporary basis did not acquire any substantive right to the post and

that mere prolonged continuous adhoc services did not ripen into a regular service to claim permanent or substantive status.

For the same proposition, reliance was also placed on another decision of this Court in Arjunbhai J. Chauhan v/s State of Gujarat reported in 38[3] GLR 2461.

[d] The decision of this Court in Vithalbhai Babaldas Patel v/s Chairman, Oil & Natural Gas Commission, Dehradun & ors. reported in 28[2] GLR 1308 was cited for the proposition that workcharge employees were appointed for short periods according to contingencies and who do not satisfy the requirements, cannot claim that their appointments should be made permanent. It was held that regular appointments under such authorities are required to be made in accordance with settled law or rules or regulations governing such appointments and the prescribed procedure. It was further held that if employment or appointment of temporary or adhoc appointee is regularised, guarantee of equality and equality of opportunity in matters of public employment enshrined in Articles 14 and 16 of the Constitution would be infringed, and such regularisation would encourage back door appointments denying equality of opportunity to those who are eligible for the post held by adhoc or temporary appointee.

[e] In State of U.P. & ors. v/s Ajay Kumar reported in 1997[4] SCC 88, the Supreme court while considering the question of regularising the daily wagers, held that there must exists a post and either administrative instruments or statutory rules must be in operation to appoint a person to the post, and that daily-wage appointment will obviously be in relation to contingent establishment in which there cannot exist any post and it continues so long as the work exists. The orders regularising the services of the daily wagers were therefore set aside.

[f] In Ashwanikumar & ors. v/s State of Bihar and ors. reported in 1997[2] SCC 1, the Supreme court held that where the initial entry itself was unauthorised and not against any sanctioned vacancy, the question of regularising the

incumbent would never survive for consideration. It was held that the posts or vacancies must be backed up by budgetary provisions so as to be included within the permissible infrastructure of the scheme, and that any posting which is dehors the budgetary grant, and on a nonexisting vacancy, would be outside the sanctioned scheme and would remain totally unauthorised. No right would accrue to the incumbent of such an imaginary or shadow vacancy.

6. In Special Civil Application No.708/89, it will be noted from the order of appointment at Annexure `B' to the petition that the appointment of the petitioner was described as purely temporary for the budgeted works on the workcharge establishment. It was stated that the appointment would last only till the scarcity relief work lasts, and that it was liable to be terminated without any prior notice. Thus, there was a specific condition in the appointment order which made the appointment purely on a contractual basis, liable to be terminated without any notice, and this stipulation was contrary to the requirements of Rule 33[1][b] of the said Rules.

6.1 Even in Special Civil Application No.5315/92, it will be seen from the order dated 19/6/1992 at Annexure `C' to the petition that the petitioner was appointed as a daily wager peon from 1/6/1992 and it was in terms stipulated that his appointment was liable to be terminated without notice.

6.2 Therefore, on the authority of the decision of the Supreme court in State of Gujarat v/s P.J.Kampavat [supra], no prior notice was required to be given under Rule 33 [1] [b] of the said Rules to any of these two petitioners since their appointments were purely contractual appointments with a specific stipulation that their services were liable to be terminated without notice. Thus, since the applicability of Rule 33[1][b] of the said Rules was so expressly excluded, the petitioners having accepted their appointments on the basis of such conditions, cannot claim any right on the ground that the provisions of Rule 33[1][b] of the said Rules were violated. It will be seen from the provisions of Rule 4 of the said Rules that the terms of specific contract enforceable at law, necessarily override the provisions of these Rules. Therefore, the term which was incorporated namely, that the services of these petitioners were liable to be terminated without notice, being a term enforceable at law had the effect of overriding the specific provision of Rule 33[1][b] by

virtue of Rule 4 of the said Rules. Moreover, as pointed out by the Supreme court in P.J.Kampavat [supra], even Rule 2 of the said Rules provides that the Rules apply except where it is otherwise expressed or implied, and therefore, the condition that the services could be terminated without notice obviously prevailed over any rule to the contrary, including Rule 33[1][b] of the said Rules.

7. It will be seen that, in both the cases, the appointments were purely on a temporary basis for a specific period and in view of the period having already expired and the specific stipulations that no notice for termination was required to be given, the petitioners had absolutely no right to continue in the employment as claimed by them. In this view of the matter, there is absolutely no substance in the contentions which have been raised in these petitions claiming continuity in the service on the basis of non-issuance of the notice in writing at the time when their services ended. Both these petitions are therefore rejected. Rule is discharged in each of them with no orders as to costs.

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